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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 805

THE PHILADA HOME FUND, INC.
c/o The Central Trust Company
Fourth and Vine Streets
Cincinnati, Ohio 45202 *Appellant,*

vs.

BOARD OF REVIEW
BUREAU OF EMPLOYMENT SERVICES
145 South Front Street
P. O. Box 1618
Columbus, Ohio 43215 *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS

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THE PHILADA HOME FUND, INC.

Appellant;

vs.

BOARD OF REVIEW

—

BUREAU OF EMPLOYMENT SERVICES

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS

The Attorney General of Ohio, on behalf of the appellee, Board of Review, Bureau of Employment Services, moves the Court to dismiss the appeal filed by appellant in the above captioned case.

STATEMENT

This case originated when the Administrator of the Ohio Bureau of Employment Services made an initial determination that Philada Home Fund, Inc. is an employer under the provisions of Section 4141.01, *et seq.*, Ohio Revised Code, and liable to contribute to the Unemployment Compensation Fund. The appellant filed an administrative appeal from the initial determination. The Administrator's Reconsidered Decision (J. S. Appendix 41, 42, 43) affirmed the initial determination and stated that Philada Home Fund, Inc. was not exempt under Section 4141.0 1(B)(2)(h), Ohio Revised Code, as it existed prior to amendment on October 29, 1971 (Appendix A, page 8.)

From the Administrator's Reconsidered Decision the case was appealed to the Board of Review, Ohio Bureau of Employment Services. The issue argued at the Board of Review stage is basically the same issue presented by the appeal pending in this court, namely whether appellant is a member of the class entitled to exemption from the Ohio Unemployment Compensation Law as provided in Section 4141.01(B)(2)(h), Ohio Revised Code, as it existed prior to amendment on October 29, 1971. The Board of Review, Ohio Bureau of Employment Services affirmed the Administrator's decision that Philada Home Fund, Inc. was not entitled to an exemption under Section 4141.01(B)(2)(h), Ohio Revised Code, as it existed prior to amendment on October 29, 1971, as Philada Home Fund, Inc. was not organized and operated exclusively for charitable purposes.

A statutory Notice of Appeal was filed in the Common Pleas Court of Franklin County, Ohio by appellant. The Common Pleas Court affirmed the decision of the Board of Review, Ohio Bureau of Employment Services that Philada Home Fund, Inc. is not entitled to an exemption from the Ohio Unemployment Compensation Law under the provisions of Section 4141.01(B)(2)(h), Ohio Revised Code, as it existed prior to amendment on October 29, 1971; the Court further found that the decision of the Board of Review was based on reliable, probative and substantial evidence and that said decision was not unconstitutional under the Ohio or United States Constitutions as amended (J. S. Appendix 25, 26.)

The decision of the Common Pleas Court was affirmed by the Court of Appeals of Franklin County, Ohio (J. S. Appendix 10, 11.) The Supreme Court of Ohio dismissed the appeal *sua*

sponte as no substantial constitutional question was presented (J. S. Appendix 6.)

It should be noted by this Court that Section 4141.01(B)(2)(h), Ohio Revised Code, was recently amended effective October 29, 1971, and is now denominated as Section 4141.01(B)(3)(h), Ohio Revised Code, (Appendix B , page 9), and for clarity the new amendment must be read together with the newly enacted Section 4141.01 (B) (2) (b), Ohio Revised Code, effective October 29, 1971, (Appendix C, page 10).

The effect of the new amendments as cited above is to eliminate the statutory exemption which is at issue in this case for all services performed after January 1, 1972. Therefore, the issue in this case is narrowed to the time period prior to January 1, 1972.

ARGUMENT

Appellant's basic argument draws into question the validity of a statutory classification under Ohio Law as construed by the Supreme Court of Ohio and contends that said statutory classification as construed is a violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

This court has often stated the principal that there is no denial of equal protection provided that the statutory classification as construed is neither capricious nor arbitrary but rather is based on reason and proper policy considerations and is free from invidious discrimination. *Brown-Forman Co. v. Kentucky*, 217 U.S. 563; 30 S. Ct. 578 (1910). *Dandridge v. Williams*, 397 U.S. 471, 90 S. Ct. 1153 (1970). *Richardson v. Belcher*, 40 U.S. L. W. 4015 (U.S. Nov. 23, 1971).

Appellant's exclusion from the exemption provided in Section 4141.01(B)(2)(h), Ohio Revised Code (Appendix A, page 8), was predicated on facts which demonstrated that Philada Home Fund, Inc. was not organized and operated *exclusively* for charitable purposes. Those same facts had already been litigated in the Supreme Court of Ohio.

The prior action, *Philada Home Fund v. Board of Tax Appeals*, 5 Ohio St. 2d 135 (1966), involved a different tax exemption statute, Section 5709.12, Ohio Revised Code, and a different instrumentality of the State of Ohio as appellee, but the factual issue in the prior case is essentially identical to the factual issue in the present action.

Both the prior and the present action involve tax exemption statutes whose principle requirement is that the entity claiming the exemption be *exclusively* charitable. In the present action Philada Home Fund, Inc. claimed an exemption from the unemployment compensation tax under Section 4141.01(B)(2)(h), Ohio Revised Code, which, at that time, exempted "* * * services performed in the employ of a corporation, * * * organized and operated *exclusively* for charitable, * * * purposes, * * *," while in the prior action Philada Home Fund, Inc. claimed an exemption under Section 5709.12, Ohio Revised Code, which, at the time the action was pending, exempted from property tax "Real and tangible personal property belonging to institutions that are used *exclusively* for charitable purposes * * *." (Emphasis added.) Although the exemptions appear in different statutes and exempt different items, those differences are not material as the substance of each exemption is that the entity claiming the exemption be *exclusively* charitable.

Philada Home Fund, Inc. is now, as it was at the time of the prior case in 1966, not exclusively charitable. The Supreme Court of Ohio in commenting on the nature of Philada Home Fund, Inc., in the case of *Philada Home Fund v. Board of Tax Appeals, supra,* said, at page 137, that:

> "The charitable purpose of the nonprofit corporation which owns this housing and holds it for rent only to aged and needy persons at or below cost may be admitted, but the exemption is claimed under Section 5709.12, Revised Code, which extends exemption only to property 'that is exclusively for charitable purposes.' The only use of this property is for private residential housing."

The Court stated further, at page 138, that:

> "Our decision in this case is buttressed by the holding in *County of Douglas v. OEA Senior Citizens, Inc.,* 172 Neb. 969, 707, 111 N.W. 2d 719, wherein the court stated: '* * * No definition of charity in any available lexicon is sufficient upon which to declare what has been described in this record as exclusively charitable, that is that the furnishing of low-cost housing at its real cost is charitable.' "

Appellee contends that the prior *Philada* case, *supra,* compels the application of the doctrine of collateral estoppel as to the issue of whether Philada Home Fund, Inc. is exclusively charitable. As enunciated by this Court in *Ashe v. Swenson,* 397 U.S. 436, 90 S. Ct. 1189 (1970), once an issue of ultimate fact has been decided between two parties, that factual issue cannot be relitigated by those same parties in a future action. The factual issue whether Philada Home Fund, Inc. was exclusively charitable was litigated between appellant and the State of Ohio in a prior action, *Philada Home Fund v. Board of Tax Appeals, supra,* and appellant did not appeal that decision.

Appellee further contends that Philada Home Fund, Inc., was specifically distinguished by the Supreme Court of Ohio from others who were exempted under the provisions of Section 4141.01(B)(2)(h), Ohio Revised Code, in the case of *Carmelite Sisters, St. Rita's Home v. Board of Review,* 18 Ohio St.2d 41 (1969), reprinted in its entirety at Appendix D, pages 11–15).

Appellant accurately quotes and heavily relies upon the second syllabus of the *St. Rita's Home* case, *supra,* (J.S. 9, 10). However, appellant fails to mention that Philada Home Fund, Inc. was distinguished by the Court from the application of that syllabus. The Court stated, at page 43–44, that;

> "To sustain the Home's (St. Rita's) contention we must find that the care of the aged and infirm by a home operated by a corporation not for profit constitutes '* * * activities * * * confined exclusively to the rendition of service * * * for its * * * charitable * * * purposes.' Section 4141.01(B)(2)(h), Revised Code. The board (Board of Review, Bureau of Employment Services) contends that *Philada Home Fund v. Board of Tax Appeals,* 5 Ohio St.2d 135, is controlling here and compels us to reject the Home's contention. That case held that the real property of a nonprofit corporation which was used for apartments for aged and needy persons was not used exclusively for charitable purposes and was not exempt from real property taxation. The *Philada Home Fund* case may be distinguished on its facts from the instant case, and we hold that a corporation not for profit which operates a home *caring* for the aged and infirm is *not* an employer, under Section 4141.01(A), Revised Code, liable to contribute to the Unemployment Compensation Fund.

> "In *Philada Home Fund v. Board of Tax Appeals, supra,* apartments built and operated by a nonprofit corporation were offered for rent to 'aged and needy self-respecting persons of good character,' with preference given to couples over individuals. *No services were provided for the residents of the Philada Home, other than those provided to a lessee of any age in any apartment building.* It does not appear that Philada Home had a doctor on call at all times, or a registered nurse and two practical nurses on its staff as does the Home in the instant case. Nor did the Philada Home provide meals, dietary or other treatment and care for its residents. *In summary, the Philada Home was not used exclusively for charitable purposes since it did not care for its residents in ways they could not care for themselves."* (Emphasis added.)

Furthermore, in the *St. Rita's* opinion, *supra,* the Supreme Court of Ohio overruled two of its prior decisions which involved the property tax exemption provided in Section 5709.12, Ohio Revised Code; the decisions overruled were *In re: Exemption Real Property from Taxation by Luthern Senior City,* 9 Ohio St.2d 151 (1967) and *Crestview v. Donahue,* 14 Ohio St. 2d 121 (1968). Both cases were based on the authority of *Philada Home Fund v. Board of Tax Appeals, supra.* The Court determined that in the light of its decision in the *St. Rita's* case, *supra,* Crestview, Inc. and Luthern Senior City are exempted under Section 5709.12, Ohio Revised Code, but the Court did not overrule *Philada Home Fund v. Board of Tax Appeals, supra.* The Court obviously treated the requirement that an entity claiming exemption must be exclusively charitable to be the same requirement under Section 5709.12, Ohio Revised Code, as under Section 4141.01(B)(2)(h), Ohio Revised Code, and using the criteria of services provided, the Court properly distinguished Philada Home Fund, Inc. from the other members of the exempt class.

Appellee further contends that the Notice of Appeal filed by appellant in this Court (J.S. Appendix 1–3) contains federal questions which were not argued or passed on by any Court below. Specifically, questions 2 (a) and 2 (b) of appellant's Notice of Appeal raise issues decided in *Philada Home Fund v. Board of Tax Appeals, supra,* and not previously raised in the instant case. Appellant had ample opportunity to appeal these precise questions when the Supreme Court of Ohio decided *Philada Home Fund v. Board of Tax Appeals, supra,* and appellant chose not to appeal that decision.

Appellee further contends that appellant has failed to comply with the rules of this Court in that, contrary to Rule 15 (d), appellant has failed to point with specificity to those portions of the record which reveal the method of raising and disposing of the federal question sought to be reviewed.

CONCLUSION

The exclusion of Philada Home Fund, Inc. from membership in the exempt class provided in Section 4141.01(B)(2)(h), Ohio Revised Code, is rationally based and free from invidious discrimination. There is no substantial constitutional issue raised by appellant. Therefore, appellee respectfully requests this Court to grant appellee's Motion to Dismiss.

Respectfully submitted,

WILLIAM J. BROWN,
Attorney General of Ohio,

JOSEPH M. HOWARD,
Executive Assistant to the Attorney General

P. Michael DeAngelo
Assistant Attorney General

James E. Uprichard, Jr.
Assistant Attorney General

Counsel for Appellee,
Board of Review,
Bureau of Employment Services
State House Annex
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CERTIFICATE OF SERVICE

I, Joseph M. Howard, Executive Assistant to the Attorney General of the State of Ohio, a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on the day of February, 1972, I served three copies of the foregoing Motion to Dismiss, by first class mail, postage prepaid, upon counsel for appellant, Murray Seasongood, 1700 Central Trust Tower, Cincinnati, Ohio 45202.

JOSEPH M. HOWARD
Executive Assistant to
the Attorney General

APPENDIX A

The relevant provision of the Ohio Revised Code, Section 4141.01(B)(2)(h), as it existed prior to amendment on October 29, 1971, providing for a charitable exemption under the Unemployment Compensation Law states that:

(B)(2) "Employment" does not include:

* * *

(h) Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefits of any private shareholder or individual, and the activities of which are confined exclusively to the rendition of service, or the production of commodities, for its respective religious, charitable, scientific, literary, or educational purposes.

APPENDIX B

The relevant provision of the Ohio Revised Code, Section 4141.01 (B)(2)(h) as amended, on October 29, 1971and newly denominated as Section 4141.01(B)(3)(h), Ohio Revised Code:

(B)(3) "Employment" does not include:

* * *

(h) Service performed prior to January 1, 1972, in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefits of any private shareholder or individual, and the activities of which are confined exclusively to the rendition of service, or the production of commodities, for its respective religious, charitable, scientific, literary, or educational purposes.

Service Performed After December 31, 1971:

(i) in the employ of a church or convention or association of churches, or in an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

(ii) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(iii) in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market by an individual receiving such rehabilitation or remunerative work.

APPENDIX C

The relevant provision of the Ohio Revised Code, Section 4141.01(B)(2)(b) as newly enacted on October 29, 1971:

(B)(2) "Employment" includes:

* * *

(b) Service performed after December 31, 1971, by an individual in the employ of a religious, charitable, educational, or other organization which is excluded from the term "employment" as defined in the "Federal Unemployment Tax Act", 84 Stat. 713, 26 U.S.C.A. 3301, solely by reason of Section 26 U.S.C.A. 3306(c)(8) of that act and is not excluded under Division(B)(3) of this section.

APPENDIX D

Opinion and Decision of
the Ohio Supreme Court

Carmelite Sisters, St. Rita's Home, Appellant, *v.* Board of Review, Bureau of Unemployment Compensation, Appellee.

1. The care of the aged and infirm by a home operated by a corporation not for profit constitutes "* * * activities * * * confined exclusively to the rendition of service * * * for its * * * charitable * * * purposes" under Section 4141.01(B)(2)(h), Revised Code. (*Philada Home Fund* v. *Board of Tax Appeals,* 5 Ohio St. 2d 135, distinguished; paragraph two of the syllabus in *Vick* v. *Cleveland Memorial Medical Foundation,* 2 Ohio St. 2d 30, approved and followed; *In re Exemption of Real Property From Taxation by Lutheran Senior City,* 9 Ohio St. 2d 151, overruled; *Crestview, Inc.,* v. *Donahue,* 14 Ohio St. 2d 121, overruled except as to the undeveloped meadow, the small golf course and the residence of the director.)
2. A corporation not for profit which operates a home caring for the aged and infirm is not an "employer", under Section 4141.01(A), Revised Code, liable to contribute to the Unemployment Compensation Fund.

(No. 68-161—Decided April 30, 1969.)

Appeal from the Court of Appeals for Franklin County.

The Administrator of the Bureau of Unemployment Compensation determined that appellant, Carmelite Sisters, St. Rita's Home, was an employer under Section 4141.01(A), Revised Code, liable to contribute to the Unemployment Compensation Fund.

The home for the aged and infirm, now known as St. Rita's Home for the Aged, was originally built by a real estate development corporation and operated as a proprietary rest home by a subsidiary of the development corporation. In 1964, the Roman Catholic Diocese of Columbus purchased the home and furnishings and placed it under the direction of members of the Carmelite Sisters of the Aged and Infirm until September 1965.

On September 16, 1965, St. Rita's Home for the Aged, Inc., a corporation not for profit, was incorporated, and the real property, furniture, fixtures and equipment transferred by the diocese to the corporation. Under its articles of incorporation, St. Rita's Home for the Aged, Inc., is organized to establish, maintain and operate a home for indigent and aged men and women and to provide for their welfare and comfort. The sole criteria for admission to the home is that the applicant must be 65 years of age or older and *have need* for the services rendered by the Home.

St. Rita's Home operates on a break-even budget. Any surplus of revenue over operating costs would be used to improve the home. A majority of the residents pay a monthly charge which not only defrays the cost of their own upkeep but helps to pay the cost of those residents who are unable to pay the full rate.

After the transfer of the property from the diocese to St. Rita's Home for the Aged, Inc. application was made to relieve the home from liability for contributions to the Unemployment Compensation Fund.

The real property owned by the home and bequests to the home have been determined by the Board of Tax Appeals to be used exclusively for charitable purposes, and therefore exempt from taxation.

The Administrator of the Bureau of Unemployment Compensation determined that the services rendered by the home were not exclusively for charitable purposes because the residents paid all or a large part of the cost of their own upkeep and that, therefore, the Home was an "employer", under Section 4141.01(A), Revised Code, liable to contribute to the Unemployment Compensation Fund. That determination was affirmed by the Bureau of Unemployment Compensation Board of Review, the Court of Common Pleas and the Court of Appeals for Franklin County.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Messrs. Connor, Connor & Bennett and *Mr. John D. Connor,* for appellant.

Mr. Paul W. Brown, attorney general, and *Mr. C. Richard Gregg,* for appellee.

Duncan, J. The question before the court is whether St. Rita's Home, appellant herein, is an "employer", as defined in Section 4141.01(A), Revised Code, required to make contributions to the Unemployment Compensation Fund. The Home contends that it is not an "employer" because it is "* * * organized and operated exclusively for * * * charitable * * * purposes * * * the activities of which are confined exclusively to the rendition of service * * * for its * * * charitable * * * purposes * * *." Section 4141.01(B)(2)(h), Revised Code. The Board of Review, appellee herein, contends that the Home's activities are not "* * * confined exclusively to the rendition of service * * * for its * * * charitable * * * purposes", since all the residents pay something toward their upkeep and a majority of them pay a rate which more than defrays the cost of their own upkeep.

To sustain the Home's contention we must find that the care of the aged and infirm by a home operated by a corporation not for profit constitutes "* * * activities * * * confined exclusively to the rendition of service * * * for its * * * charitable * * * purposes." Section 4141.01(B)(2)(h), Revised Code. The Board contends that *Philada Home Fund* v. *Board of Tax Appeals,* 5 Ohio St. 2d 135, is controlling here and compels us to reject the Home's contention. That case held that the real property of a non-profit corporation which was used for apartments for aged and needy persons was not used exclusively for charitable purposes and was not exempt from real property taxation. The *Philada Home Fund case* may be distinguished on its facts from the instant case, and we hold that a corporation not for profit which operates a home caring for the aged and infirm is not an employer, under Section 4141.01(A), Revised Code, liable to contribute to the Unemployment Compensation Fund.

In *Philada Home Fund* v. *Board of Tax Appeals, supra,* apartments built and operated by a nonprofit corporation were offered for rent to "aged and needy self-respecting persons of good character," with preference given to couples over individuals. No services were provided for the residents of the Philada Home, other than those provided to a lessee of any age in any apartment building. It does not appear that the Philada Home had a doctor on call at all times, or a registered nurse and two practical nurses on its staff as does the Home in the instant case. Nor did the Philada Home provide meals, dietary or other treat-

ment and care for its residents. In summary, the Philada Home was not used exclusively for charitable purposes since it did not care for its residents in ways they could not care for themselves.

The board seeks to distinguish the instant case from the public charitable hospital cases, culminating in *Vick* v. *Cleveland Memorial Medical Foundation,* 2 Ohio St. 2d 30, on the sole ground that the Home is not a hospital. In paragraph two of the syllabus of *Vick* the court said:

"Where a corporation not for profit is operating a hospital for the primary purpose of providing services to those in need, without regard to race, creed, color or ability to pay, the facts that the hospital charges patients who are able to pay for its services and that a surplus has been created in the hospital fund (no part of which has been diverted to a private profit) do not change its essentially charitable nature."

In the years since 1912, when the Ohio Constitution was amended so that exemption from taxation might be granted to "institutions used exclusively for charitable purposes" (instead of "institutions of purely public charity" as previously provided), our concept of charity has changed a great deal. We no longer tolerate the notion that the aged, sick and needy must suffer and die without special care if they cannot afford to pay for it, or if, having money, there is some other reason they cannot obtain it.

Both a sick person in a hospital and a resident in a home for the aged and infirm are there because they need to be cared for when they cannot do so for themselves. The fulfillment of that need for care is the charitable purpose of the hospital in *Vick,* and of the Home in this case. We reaffirm the rationale of paragraph two of the syllabus in the *Vick case* and deem it controlling here.

Because of the foregoing discussion of the *Philada Home Fund case,* we find it necessary to review our decision in *In re Exemption of Real Property From Taxation by Lutheran Senior City,* 9 Ohio St. 2d 151, where, on facts almost identical to those in this case, we affirmed, on the authority of *Philada Home Fund,* a decision of the Board of Tax Appeals denying application for exemption from real property taxation. Since the facts in the *Lutheran Senior City case* should have been distinguished from the *Philada Home Fund case,* as we do in this case, we overrule our decision in the *Lutheran Senior City case.*

We must also reconsider our decision in *Crestview, Inc.*, v. *Donahue* (1968), 14 Ohio St. 2d 121, where we held that a community operated by a nonprofit corporation, affiliated with the Methodist Flower Hospital of Toledo (consisting of a 170-unit apartment for people over 65 years of age, the residence of the director, an undeveloped meadow and small golf course for the use of the residents, and a hospital and nursing care center), was not exempt from real property taxation for the reason that none of the parcels of land were being used exclusively for charitable purposes. The opinion in the *Crestview case* reveals that residents of the apartment unit were required to pay a fee for food and that a guaranteed life-care plan was part of the contract with every resident. Since we take the view that all services connected with the care of the aged and infirm in such a home are for charitable purposes the decision in *Crestview, Inc.*, v. *Donahue, supra,* (14 Ohio St. 2d 121), is overruled, except as to the undeveloped meadow, the small golf course and the residence of the executive director. See *Doctors Hospital* v. *Board of Tax Appeals,* 173 Ohio St. 283; *Western Reserve Academy* v. *Board of Tax Appeals,* 153 Ohio St. 133.

The Board contends that reasons of public policy, such as the encouragement of economic growth, require that liability for contributions to the Unemployment Compensation Fund be spread among the greatest number of employers, including some, at least, who benefit from real property and inheritance tax exemptions because of their charitable purposes. We reject this argument since we adhere to the time-honored rule of statutory construction which decrees that the legislative intent may be inquired into only if the enactment is ambiguous upon its face. There may be good reasons why charitable institutions which are exempt from real property and inheritance taxation should not be exempt from contributing to the Unemployment Compensation Fund, but such reasons are not readily apparent from the statutes creating the various charitable exemptions which are similarly worded.

For the reasons stated, we find that the judgment of the Court of Appeals is contrary to law, and is, therefore, reversed.

Judgment reversed.

Taft, C. J., O'Neill, Schneider and Cole, JJ., concur.

Zimmerman and Matthias, JJ., dissent.

Cole, J., of the Third Appellate District, sitting for Herbert, J.